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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/518,356	12/17/2004	Tokutomi Watanabe	47233-0048	8100

55694 7590 10/25/2007

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EXAMINER	
STULII, VERA	

ART UNIT	PAPER NUMBER
1794	

MAIL DATE	DELIVERY MODE
10/25/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/518,356	WATANABE ET AL.	
	Examiner	Art Unit	
	Vera Stulii	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-12 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-12 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date 10/11/05, 12/17/04
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

***NOTE**: The claims are generally narrative and indefinite, failing to conform with current U.S. practice. They appear to be a literal translation into English from a foreign document and are replete with grammatical and idiomatic errors.*

Claims 1-4 are rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential elements, such omission amounting to a gap between the elements. See MPEP § 2172.01. The omitted elements are: those which would result in the recited "foam-holding agent". The only recited physical components are (i) water extract of tea leaves and/or (ii) ethanol extract of tea leaves. Collectively or alone these components would not be considered to form a "foam-holding agent". Thus it is unclear as to how this claimed resultant product is actually formed.

Claims 1-3, 5 and 12 are indefinite for the recitation of the phrase "water and/or ethanol extract of tea leaves". It is unclear whether the claims encompass any of the following possible interpretations, or some other interpretation:

- ethanol extract of tea leaves and water;
- ethanol extract of tea leaves or water;

- water;
- aqueous ethanol extract of tea leaves;
- aqueous extract of tea leaves;
- aqueous ethanol extract of tea leaves and ethanol extract of tea leaves;
- aqueous ethanol extract of tea leaves or ethanol extract of tea leaves;

Claim 2 is indefinite for the recitation of the phrase "[t]he foam-holding agent according to claim 1, which is obtained by concentrating a water". It is unclear as to how the water could be concentrated.

Claim 3 recites Brix degree of the concentrate. Since Degrees Brix is a measurement of the mass ratio of dissolved sucrose to water in a liquid, and claim 1 does not recite sucrose or any other sweetener, it is not clear how Brix degree recitation further limits claim 1.

Claims 4 and 7 recite specific types of tea. Claim 1, as currently written, may be interpreted as "A foam-holding agent which comprises water" (see rejection above), and therefore does not require tea extract. Claim 5 does not require tea extract as well. Thus it is not clear how recitation of particular tea types in claims 4 and 7 further limit claims 1 and 5.

Claim 8 recites the limitation "the internal pressure of carbon dioxide" in line 2. There is insufficient antecedent basis for this limitation in the claim. It is also not clear how the "internal pressure" limitation is applied to a beverage that has not been bottled or packaged in a can.

Claim 9 is indefinite for the recitation of the phrase "wherein a fermented grain liquor is not used as a source material". It is not clear as to what the source material refers to.

Claim 12 is indefinite for the recitation of the phrase "A method for producing a carbon dioxide-containing drink, which comprises preparing a drink blended with a foaming agent and a water and/or ethanol extract of tea leaves". It is unclear if "the drink" is blended with foaming agent and tea extract, or the drink is formed by blending foaming agent with tea extract.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 5, and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Liu (CN 1237624).

In regard to claims 1, 5, and 12, Liu discloses a carbon dioxide containing beverage that is formed from tea (tea extract), wine, liquor, fruit juice, white granulated sugar, sweetening agent, carbon dioxide, foaming agent, thickening agent, etc. (Abstract). Regarding tea extract recitations, it is noted that tea as a beverage is a tea extract, since tea leaves do not dissolve in water during brewing. Tea flavor is extracted during the brewing of tea.

Claims 1, 5, and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Suzuki et al (JP 04356160).

In regard to claims 1, 5, and 12, Suzuki et al disclose adding emulsifier and ethyl alcohol to an aqueous extract of tea (Abstract). Suzuki et al also disclose that the resultant composition "is forced to be mixed with air and foamed" by using homogenizer. Suzuki et al disclose "a composition excellent in foamability, foam adhesion, uniformity, etc." (Abstract). Regarding carbon dioxide recitations, it is noted that air contains carbon dioxide, and forcing composition to be mixed with air, is the same as forcing composition to be mixed with carbon dioxide. Regarding tea extract recitations, it is noted that tea as a beverage is a tea extract, since tea leaves do not dissolve in water during brewing. Tea flavor is extracted during the brewing of tea.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 2-4, 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Liu (CN 1237624).

Liu is taken as cited above.

Regarding claims 2 and 3, see rejection under 35 U.S.C. 112, second paragraph above. Also in regard to claim 3, Liu do not specifically disclose Brix degree of tea extract. However, Liu discloses use of granulated sugar and sweetening agent in composition. One of ordinary skill in the art would have been motivated to vary amount of sugar in the beverage depending on a desired sweetness. One of ordinary skill in the art would have been motivated to do so, since this was a common practice in the art. One of ordinary skill would also have been motivated to vary amount of sugar in the beverage depending on personal sweetness preferences of a consumer.

Regarding claims 4 and 7, Liu do not disclose particular type of tea. Given the fact that both green tea and black tea types were well known in the art to be used for tea beverages preparation, one of ordinary skill in the art would have been motivated to choose a particular type of tea based on a personal preferences of a consumer, such as color, flavor, taste, etc. Particular choice of tea would not have involved an inventive step.

Regarding claim 8, see rejection under 35 U.S.C. 112, second paragraph above. Also in regard to claim 8, Liu do not specifically disclose particular internal pressure of

carbon dioxide. However, one of ordinary skill in the art would have been motivated to vary amount of carbon dioxide incorporated depending on a desired mouthfeel, fizz and flavor.

In regard to claim 9-11, Liu discloses wine and fruit juice. Liu do not particularly disclose alcohol content of the resulting beverage. However, one of ordinary skill in the art would have been motivated to vary amount of alcohol in the beverage due to the consumer preference of alcohol product, and also based upon the concentration of the final preparation, materials, etc.

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Liu (CN 1237624) in view of Gong Yungao (CN 1285153).

Liu is taken as cited above. Liu discloses that tea beverage is a refreshing drink having that prevents fatigue and regulates appetite.

Liu do not disclose use of hop extract.

Gong Yungao disclose tea beverage "with medical health care" action containing hops and tea leaf extract. Gong Yungao discloses that the finished product prevents hypertension, regulates metabolism, and has a good taste.

Since Liu discloses tea beverage with beneficial properties for human health, and since Gong Yungao discloses tea beverage in combination with hops that prevents hypertension, regulates metabolism, and has a good taste, one of ordinary skill in the art would have been motivated to modify disclosure of Liu and to include hop extract as an ingredients for the benefits taught by Gong Yungao. One of ordinary skill in the art

would have been motivated to do so, since both tea and hops are known to impart bitter flavor to beverages. One of ordinary skill in the art would also have been motivated to do so, since hops were well known in the art to be used in preparation of effervescent beverages.

Claims 2-4, 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Suzuki et al (JP 04356160).

Suzuki et al is taken as cited above.

Regarding claims 2 and 3, see rejection under 35 U.S.C. 112, second paragraph above. Also in regard to claim 3, Suzuki et al do not specifically disclose Brix degree of tea extract. One of ordinary skill in the art would have been motivated to add sugar to a tea beverage and to vary amount of sugar in the beverage depending on a desired sweetness. One of ordinary skill in the art would have been motivated to do so, since this was a common practice in the art. One of ordinary skill would also have been motivated to vary amount of sugar in the beverage depending on personal sweetness preferences of a consumer.

Regarding claims 4 and 7, Suzuki et al do not disclose particular type of tea. Given the fact that both green tea and black tea types were well known in the art to be used for tea beverages preparation, one of ordinary skill in the art would have been motivated to choose a particular type of tea based on a personal preferences of a consumer, such as color, flavor, taste, etc. Particular choice of tea would not have involved an inventive step.

Regarding claim 8, see rejection under 35 U.S.C. 112, second paragraph above. Also in regard to claim 8, Suzuki et al do not specifically disclose particular internal pressure of carbon dioxide. However, one of ordinary skill in the art would have been motivated to vary amount of carbon dioxide incorporated depending on a desired mouthfeel, fizz and flavor.

In regard to claim 9-11, Suzuki et al discloses use of ethyl alcohol. Suzuki et al do not particularly disclose alcoholic content of the resulting beverage. However, one of ordinary skill in the art would have been motivated to vary amount of alcohol in the beverage due to the consumer preference of alcohol product.

Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Suzuki et al (JP 04356160) in view of Gong Yungao (CN 1285153).

Suzuki et al is taken as cited above.

Suzuki et al do not disclose use of hop extract.

Gong Yungao disclose tea beverage "with medical health care" action containing hops and tea leaf extract. Gong Yungao discloses that the finished product prevents hypertension, regulates metabolism, and has a good taste.

Since Gong Yungao discloses tea beverage in combination with hops that prevents hypertension, regulates metabolism, and has a good taste, one of ordinary skill in the art would have been motivated to modify disclosure of Suzuki et al and to include ingredients (including hop extract) as taught by Gong Yungao for the benefits taught by Gong Yungao. One of ordinary skill in the art would have been motivated to do so, since

both tea and hops are known to impart bitter flavor to beverages. One of ordinary skill in the art would also have been motivated to do so, since hops were well known in the art to be used in preparation of effervescent beverages.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

VS

KEITH HENDRICKS
PRIMARY EXAMINER